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HASHIM HJ JASIN

v.

PEGAWAI PENGURUS PILIHANRAYA MOHD DAUD ABDUL HAMID & ORS

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HIGH COURT MALAYA, KANGAR
ZAINAL ADZAM ABD GHANI J
[ELECTION PETITION NO: 26-1-2008]
18 JUNE 2008

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ELECTION: *Petition - Challenge to election result - Mistake in counting of votes - Whether would directly affect result - Whether winner not duly elected - Whether court could declare petitioner as candidate who ought to be returned - Whether by-election ought to be held - Amendment vide Act A1177 - Effect - Election Offences Act 1954, ss. 35, 36, 42 - Election Petition Rules 1954, r. 4(4) - Election (Conduct of Elections) Regulations 1981, reg. 25D(7)*

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The petitioner is the losing candidate in the general election held on 8 March 2008 for the constituency of Dewan Undangan Negeri N15, Sanglang, Perlis. The petitioner alleged that the Returning Officer ('RO') in the election had made a mistake when counting the number of votes garnered by him and the third respondent, and had thereby wrongfully declared the latter instead of himself as the winning candidate, and in the circumstances, prayed for the following relief: (1) a declaration that the third respondent had not been duly elected pursuant to reg. 25D(7) of the Elections (Conduct of Elections) Regulations 1981 ('Regulations'); (2) a declaration that he ought to have been elected or returned; and (3) determination and directions under s. 36 of the Election Offences Act 1954 ('the Act'). The respondent conceded the mistake but raised the objection that the petitioner's prayer 2 could not be entertained in view of the fact that the phrase "declaration that any candidate was duly elected and ought to have been returned" appearing previously in s. 35(c) of the Act had since been deleted by Act A1177 (Election Offences (Amendment) Act 2002) with effect from 16 January 2003. The petitioner acknowledged the deletion, but argued that the court could still declare himself as the duly elected candidate by virtue of r. 4(4) of the Election Petition Rules 1954 ('the Rules') read together with s. 35(c) of the Act. According to the petitioner, r. 4(4) of the Rules prescribed the form to be used in

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election petitions, and in there it was clearly stated that among the prayers that could be included in the petition was "or that the said E.F (ie. *the relevant candidate – editor*) was duly elected and ought to have been returned". It was thus the petitioner's stand that r. 4(4) made prayer 2 a legitimate prayer which could be granted by the court. Rule 4(4) apart, the petitioner also contended that assuming that there was a lacuna in the law, the court could still grant prayer 2 and correct the "injustice" by resorting to its inherent powers. The primary issue that arose was whether on the facts and in the circumstances the election court herein could declare the N15 election void by reason of the RO's mistake and consequently grant the prayers sought by the petitioner.

Held (allowing prayers 1 and 3; disallowing prayer 2):

(1) A mistake in the counting and totalling of votes would directly affect the result of the election. That is apparent beyond argument. Such mistake therefore must be a non-compliance and a valid ground for a declaration that the candidate so returned was not duly elected or ought not to have been returned under s. 35(b) of the Act. (para 3)

(2) Inherent powers or jurisdiction of the court is a procedural rule to prevent injustice or abuse of process of the court. The only mention of "inherent jurisdiction" in law is found in O. 92 r. 4 of the Rules of the High Court 1980. Therein lies its limitation, viz. it cannot be part of substantive law. To go beyond that would be tantamount to the court encroaching into the powers of the legislature. (para 5)

(3) The enabling provision which would have authorised this court to grant prayer 2 of the petition was deleted by Act A1177. The effect of the deletion is that the Election Petition Court is no longer authorised or empowered to declare "any candidate which ought to be duly elected or returned". (para 7)

(4) The provision of s. 35(c) of the Act was a substantive provision and is no more available by virtue of Act A1177. Where Parliament in its wisdom has addressed the issue in question by deleting s. 35 of the Act, it cannot be said that there is a lacuna in the law which can be overcome by using the inherent powers of the court. (para 7)

(5) The short answer to the argument on r. 4(4) of the Rules is found in s. 23(1) of Interpretation Acts 1948 and 1967 which provides "any subsidiary legislation that is inconsistent with an Act … shall be void to the extent of the inconsistency". When s. 35(c) of the Act was deleted, the clause in the prescribed form, being part of a subsidiary legislation of the Act, immediately became *ultra vires* the Act for providing a relief that is no longer available in s. 35 of the Act. Obviously, that clause remained due to an oversight during the deletion of s. 35(c) but it has become a dead letter and is of no effect by virtue of s. 23 of the Interpretation Acts 1948 and 1967. (para 8)

(6) In the context of this petition, s. 35(b) of the Act enables this court to grant order in terms of prayer (1), namely that the third respondent "was not duly elected or ought not to have been returned". This court does so declare. Prayer 2 however cannot be granted. As to prayer 3, this court will certify this determination to the Election Commission in due course pursuant to s. 36(2)(a) of the Act. (para 9)

(7) All the available relief in s. 35 of the Act ought to be read disjunctively, ie. they can be granted separately and not necessarily together. As this court had granted order in terms for prayer 1, effectively there is a vacancy in the constituency of N15. When there is such a vacancy, it must be filled within 60 days from the date it is established by the Election Commission that there is a vacancy. Consequently, upon being certified of the determination of the petition by this court under s. 36(2) of the Act, the Election Commission is obliged to issue a Writ of Election to the RO under s. 12 of the Election Act 1958 directing him to conduct a by-election on the date specified in the writ.

[Order accordingly.]

Case(s) referred to:

Delcont (M) Sdn Bhd v. Motor Sport International Ltd [1996] 1 CLJ 450 HC ***(refd)***

Rajesselvi Sinnakaruppan v. Batumalay Jeyaram [2001] 4 CLJ 535 HC ***(refd)***

R Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***

SBSK Plantation Sdn Bhd v. Dynasty Rangers (M) Sdn Bhd [2002] 2 CLJ 329 HC ***(refd)***
Tan Beng Sooi v. Penolong Kanan Pendaftar [1995] 2 CLJ 846 HC ***(refd)***

Legislation referred to:
Election Act 1958, s. 12
Election Offences Act 1954, ss. 32(b), 35(a), (b), (c), 36(2)(a), 42(1)
Election Petition Rules 1954, r. 4(4)
Elections (Conduct of Elections) Regulations 1981, reg. 25D(2), (5), (7)
Interpretation Acts 1948 & 1967, s. 23(1)
Laws of the Constitution of Perlis, art. 55(5)
Rules of the High Court 1980, O. 92 r. 4

Other source(s) referred to:
Tunku Sofia Jewa, *Malaysian Election Laws*, vol 111 2003, p 1564

For the petitioner - Mohamed Hanipa Maidin (Zulmi Sabri & Aqbal Shiffudin Adnan Sallehudin with him); M/s Zul Jaafar Ibrahim & Co
For the respondent 1 & 2 - Dato' Kamaludin Md Said (Rozi Bainon & Wan Roslan Wan Ismail with him);
For the respondent 3 - Jegathesan Karupiah (Albert Antoni Tass with him); M/s Karupiah & Co

Reported by Wan Sharif Wan Ahmad

JUDGMENT

Zainal Adzam Abd Ghani J:

[1] In the general election held on 8 March 2008 for the constituency of Dewan Undangan Negeri N.15, Sanglang, Perlis, the official result declared by respondent 1 (the returning officer) was that respondent 3 obtained 3,384 votes and the petitioner obtained 3,235 votes. Respondent 1 thereupon declared respondent 3 as duly elected with a majority of 149 votes. The petitioner alleged that respondent 1 was in breach of reg. 25D(5) of the Elections (Conduct of Elections) Regulations 1981 ("regulations") when in the process of officially totalling the number of votes of the form 14 from all the polling stations he made a mistake. According to the petitioner from all the 18 form 14 the record showed that the petitioner obtained a total of 3,333 votes while respondent 3 obtained 3,206 votes whereby showing that the petitioner had actually won by a majority of 47 votes. Based on the wrong totalling by respondent 1 he officially declared respondent 3 as duly elected under reg. 25D(7) of the

A regulations. As such the petitioner argued that the election was not conducted in compliance with the provisions laid down by law and such non-compliance affected the result of the election under s. 32(b) of the Act. The petitioner prayed for the following reliefs:

B (1) a declaration that respondent 3 was not duly elected or ought not to have been elected;

(2) a declaration that the petitioner ought to have been elected or returned; and

C (3) determination and directions under s. 36 of the Election Offences Act 1954 (the "Act").

[2] Respondent 3's main argument is that the mistake by respondent 1 as alleged by the petitioner is not a non-compliance D of s. 32(b) of the Act. Senior Federal Counsel on behalf of respondents 1 and 2 however conceded that respondent 1 did make a mistake in the official totalling of the 18 form 14 resulting in respondent 3 being wrongfully declared as duly elected. In the face of that admission, respondent 3, to his credit, through his E counsel conceded that he was wrongfully declared as duly elected in the said election. However, the submission on behalf of respondent 3 need to be disposed of.

[3] Wrongly (whether intentionally, unintentionally or negligently) F totalling the number of votes by the returning officer from all the form 14 submitted by the presiding officers of all the polling stations must by implication be a non-compliance of reg. 25D(5) of the regulations. To protect the sancity and purity of the election process it is essential that the actual counting by the G presiding officers under reg. 25D(2) of the regulations of each and every valid votes casted at all the polling stations and the subsequent official totalling of the number of votes recorded in all form 14 for each candidate by the returning officer under reg. 25D(5) of the regulations be done properly and without any H mistake whatsoever. These two provisions cannot be construed in any other way as the two process goes to the crux of the election. A mistake in the counting and the totalling of votes would directly affect the result of the election. That is apparent beyond any argument. A mistake in the counting and totalling of I votes must therefore be a non-compliance and a valid ground for a declaration that the candidate so returned was not duly elected or ought not to have been returned under s. 35(b) of the Act.

[4] As stated earlier the petitioner further prayed (prayer 2) for a declaration that the petitioner ought to have been elected or returned. Counsels on behalf of the petitioner acknowledged that s. 35(c) of the Act which read "... a declaration that any candidate was duly elected and ought to have been returned ..." was deleted by Act A1177 with effect from 16 January 2003. However they argued that it was deleted as a result of a decision in the election petition case of *Lee Chong Meng v. Election Commission Malaysia & 2 Ors* (*Malaysian Election Laws*, Vol. 111 2003 by Tunku Sofia Jewa, p. 1564) where the court declared the losing candidate in the election as duly elected as the candidate (respondent 3) who was returned was disqualified by a previous conviction. The petitioner argued that in the present case if the court granted prayer 2, the court is not electing any candidate but merely confirming the actual winner as the person duly elected. This would correct the "injustice" to the petitioner and the court can do so under its inherent powers.

[5] Inherent powers or jurisdiction of the court is a procedural rule to prevent injustice or an abuse of the process of the court. The only mention of "inherent jurisdiction" in law is found in O. 92 r. 4 of the Rules of the High Court 1980. Therein lies its limitation, *viz.* it cannot be a part of substantive law. To go beyond that would be tantamount to the court encroaching into the power of the legislature, be it Parliament or the State Legislative Assemblies. There are numerous cases which considered this point directly or indirectly. In *Delcont (M) Sdn Bhd v. Motor Sport International Ltd.* [1996] 1 CLJ 450, 457 the court stated:

> ... the overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal and not a part of substantive law. It must be distinguished from exercise of judicial discretion; and it may be exercised even in circumstances governed by the rules of court ... .

In *Tan Beng Sooi v. Penolong Kanan Pendaftar* [1995] 2 CLJ 846 the court stated:

> In my considered opinion, the inherent jurisdiction of the court under O. 92 r. 4 cannot be used to deny the plaintiff of any legal right that may be vested in him under r. 7(b). Inherent jurisdiction under the rules of court is a procedural rule and is not intended to alter substantive rights ... .

A In *SBSK Plantation Sdn. Bhd. v. Dynasty Rangers (M) Sdn. Bhd.* [2002] 2 CLJ 329 the court stated:

> Therefore, the defendant is entitled as of right to present a winding up petition against the Plaintiff. This is a substantive right conferred upon the defendant by s. 217(1)(b) of the Act, a substantive law, and neither O. 92 r. 4(2) of the Rule of the High Court, a procedural law, nor the inherent jurisdiction of the court can deprive the defendant of that right or reduce the extend of the right ... .

C **[6]** In the case of *Rajesselvi Sinnakaruppan v. Batumalay Jeyaram* [2001] 4 CLJ 535, 543 Syed Ahmad Helmy, JC (as His Lordship was then) stated:

> At p. 160 in Re CHS his Lordship Augustine Paul JC clearly emphasised that the inherent jurisdiction under O. 92 r. 4 is only intended to be exercised to overcome procedural injustice arising from a lacuna in the rules and not to remedy any lacuna in the substantive Act when he stated:
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> > The inherent jurisdiction of the Court under O. 92 r. 4 of the RHC can be exercised in a situation where a lacuna exists in the RHC and where the same causes a procedural injustice in that it does not provide an adequate remedy or remedies and the Court is then not only entitled to fill the gap, but is obliged to do so, in order to avoid an injustice (see *Loo Choy Meng v. Ong Cheong Hoe (Gamuda Sdn Bhd Garnishee* [1989] 1 LNS 140).

Edgar Joseph Jr. FCJ in the case of *R. Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147, 230 in quoting from an article *"The Inherent Jurisdiction of the Court"* [1970] Current Legal Problems 23 stated:

> Explaining the relation between the inherent jurisdiction and the Rules of Court, the learned author says this (at p. 50):
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> > The powers of the Court under its inherent jurisdiction are complementary to its powers under Rules of Court; one set of powers supplements and reinforces the other. The inherent jurisdiction of the Court is a most valuable adjunct to the powers conferred on the Court by the Rules

[7] As mentioned earlier the enabling provision which would have authorised this court to grant prayer 2 of the petition was deleted by Act 1177 with effect from 16 January 2003. The effect of the deletion is that the Election Petition Court is no longer authorised or empowered to declare "any candidate which ought to be duly elected or returned". It is immaterial whether the deletion was based on the decision of Lee Chong Meng or not. The provision s. 35(c) of the Act was a substantive provision and is no more available. Where it is clear that Parliament in its wisdom has addressed the issue in question by deleting s. 35(c) of the Act it cannot be said that there is a lacuna in the law which can be overcomed by using the inherent powers of the court. To do so (in this petition, by granting prayer 2) would mean that this court is reinstating a provision which Parliament in 2003 deemed it necessary to be deleted from the Act. It is certainly not within the powers of the court to rewrite, alter, vary or add on to any law as laid down by statute.

[8] Counsel for the petitioner in addition argued that s. 42(1) of the Act states that the procedure and practice on election petitions shall be regulated by the Election Petition Rules 1954 and under r. 4(4) of that Rules, which prescribes the form of election petition, it is provided among the prayers that can be included in the petition the clause "... or that the said E.F. was duly elected and ought to have been returned ...". It was argued that s. 35 of the Act should be read together with this provision and as such prayer 2 of the petition is a legitimate prayer which can be granted by this court. The short answer to this is found in s. 23(1) of the Interpretation Acts 1948 and 1967 which provides:

> Any subsidiary legislation that is inconsistent with an Act (including the Act which the subsidiary legislation was made) shall be void to the extent of the inconsistency.

When s. 35(c) of the Act was deleted that clause being part of a subsidiary legislation of the Act immediately becomes *ultra vires* the Act in that it provides for a relief that is no longer available in s. 35 of the Act. That clause remained obviously due to an oversight during the deletion of s. 35(c) but it has become a dead letter and is of no effect by virtue of s. 23 of the Interpretation Acts 1948 and 1967.

[9] As to the hardship or even "injustice" to the petitioner as submitted by his counsels, it must be deemed to be a situation that Parliament had considered when deleting s. 35(c) of the Act. The subject of election after all has a direct relationship to the membership of Parliament itself. All matters relating to it is within the jurisdiction of Parliament and is therefore best determined by Parliament. As the law now stands the reliefs which can be granted by an Election Court are provided by s. 35 of the Act. In the context of this petition s. 35(b) enable this court to grant order in terms of prayer 1 ie, that respondent 3 "was not duly elected or ought not to have been returned". This court does so declare as prayed in prayer 1 of the petition pursuant to s. 35(b) of the Act with costs. Prayer 2 of the petition is not granted. This court will certify this determination to the Election Commission in due course pursuant to s. 36(2)(a) of the Act.

[10] As a postscript I would like to address a query posed by the counsels of the petitioner and respondent 3, ie, should there be a by-election as the court did not declare the election void under s. 35(a) of the Act? Firstly, there was no such declaration by this court as the petitioners did not pray for such a declaration. This is understandable in the light of petitioner's prayer 2. A declaration that the election is void would negate prayer 2 of the petition. Secondly, all the available reliefs as provided in s. 35 of the Act are to be read disjunctively and not conjuctively, ie, they can be granted separately and not necessarily together. As this court granted order in terms for prayer 1 of the Petition, effectively there is a vacancy in the constituency of Dewan Undangan Negeri N15, Sanglang, Perlis.

[11] When there is a vacancy in the Dewan Undangan Negeri, that vacancy must be filled within sixty days from the date it is established by the Election Commissions that there is a vacancy. This is provided in art. 55(5) of the Laws of the Constitution of Perlis which reads:

> A Casual vacancy shall be filled within sixty days from the date on which it is established by the Election Commissions that there is a vacancy:
>
> Provided that if a casual vacancy is established on date within two years of the date the Legislative Assembly shall in accordance with clause (3), stand dissolved, such casual vacancy shall not be filled unless the Speaker notifies the

> Election Commissions in writing that the numerical strength of the party that constitutes a majority of all the members of the Legislative Assembly is being affected by such vacancy, in which event such vacancy shall be filled within sixty days from the date of the receipt of the notification.

The proviso of that article do not apply to the circumstances of this petition. Upon being certified of the determination of the petition by this court under s. 36(2) of the Act, the Election Commission is thus obliged to issue a writ of election under s. 12 of the Election Act 1958 to the returning officer of the said constituency directing him to proceed to hold a by-election. The writ is the instrument issued by the Election Commission authorizing the returning officer to conduct the by-election on date as specified in the writ. As provided in art. 55(5) the by-election must be conducted within 60 days from the vacancy in that constituency.